United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-1003

To be argued by
Irving Anolik

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Appellee,

v.

SEYMOUR C. FELDMAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

DEFENDANT-APPELLANT'S BRIEF.

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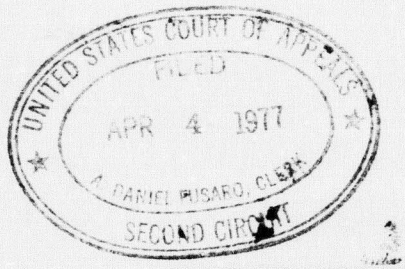

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DEFENDANT-APPELLANT'S BRIEF.

STATEMENT.

Defendant-appellant, Seymour C. Feldman, a medical doctor, appeals from a judgment of the United States District Court for the Southern District of New York, rendered the 22nd day of December 1976, convicting him of 53 counts of an indictment which charged violations of the laws pertaining to filing claims for services under the so-called "Medicare" program, after trial before Hon. William C. Conner, D.J. and a jury.

The Court sentenced the appellant to two years in incarceration, but specified that 18 months thereof was to be suspended and that he was to be on probation for that period of time.

SUMMARY OF THE PROSECUTION'S EVIDENCE.

Ten of the 53 counts which were submitted to the veniremen were so-called mail fraud violations and the remainder were so-called "false-claims" counts.

Appellant was a Lt. Colonel in the Army reserve and attended at various military bases from time to time during the period covered by the indictment.

Appellant specialized in psychiatry but had a private practice that included general medicine. We refer to "private practice" so as to distinguish this from the function of Dr. Feldman as a psychiatrist with Harlem Valley State Hospital and with the Army. He resided in Beacon, N. Y., but treated private patients there as well as in nearby towns and villages.

The thrust of the charges were as follows:

a- Counts 1 through 10 were mail fraud charges, alleging use of the mails to file false claims.

b- Counts 11-33 were so-called "military service" counts since the government contended that Feldman was in or on military duty when the claims relating to those counts arose, and therefore the prosecution urged that the services covered by those claims could not have been performed.

c- Counts 34, 35, 36 were so-called "hospital counts" since the government maintained that Feldman was at work in the hospital when the services connected with those claims arose.

d- Counts 37-60 were over billing or excessive billing allegations against the defendant.

Seven of the 60 counts were withdrawn from the jury's consideration.

THE EVIDENCE ADDUCED BY THE GOVERNMENT.

The government produced both live witnesses and videotaped "depositions." The "testimony" of Joseph Perrotte and Marion Paschier was played on videotape (109-111; 32a-34a).*

The testimony adduced by the government showed that claims submitted for the treatment of patients under the so-called Medicare program were in fact executed by Dr. Feldman. Indeed that was not disputed.

There was no dispute about the fact that Dr. Feldman was the physician for the patients for whom he caused claims for payments to be filed.

Since the Medicare program is designed to cover people over 65 for the most part, all of the persons involved were of advanced age (Tully; 30).

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* Numerals in parenthesis refer to pages of the official court reporter's minutes of trial; where followed by "a" they refer to pages of appendix.

Of the sixty counts of the indictment, all but 15 deal with claims for services submitted by defendant prior to the end of 1972.

For example, Julie Adams testified for the prosecution that she had not been treated for seven days in a row in 1971 and had not been treated for 12 days in a row in 1971 and 1972 (75; 13a).

Adams admitted that she had been interviewed by Betty Santangelo who was an attorney associated with John S. Martin, Esq., the trial counsel for appellant (84-85; 14a-15a).*

For the most part, none of the government's witnesses could recall on which days they had or allegedly had not been treated by or seen by Dr. Feldman (Scott, 120-121; Friedman, 210-211).

Staff Administrative Specialist, Harold White, testified with respect to defendant's military duty from time to time. He did not eliminate the possibility that defendant could have driven to Beacon or gotten there by other means of transit on some occasions when he was on military duty, especially weekends (57-60).

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* We point out, *infra*, in our argument that because of the objections of the Government and the ruling of the Court, appellant's rights to effective assistance of counsel were severely prejudiced because Miss Santangelo was not permitted to testify and her name could not be used to impeach credibility.

Saverio De Rosa, a contract officer with the Bureau of Health Insurance testified for the prosecution that he had interviewed Dr. Feldman on July 10, 1973, along with others (213). The statement then taken from Dr. Feldman was the subject of a pre-trial motion to suppress, but that was denied. Despite objection, De Rosa was permitted to testify as to negative facts, such as that Dr. Feldman had refused to sign something and that he could not explain why there was a question about certain signatures (217-220; 40a-43a).

In the final analysis, it is apparent that the government did establish that certain claim forms were mailed. They produced evidence that implied that certain services were not performed as claimed by Dr. Feldman on as many days as defendant's claims indicated. But, there was virtually no evidence which could point to any particular date on which a particular claimed service was or was not performed. There was a total failure of proof.

THE DEFENSE.

Both defendant-appellant and his wife testified.

Dr. Feldman's wife, Evelyn, testified as to the manner in which he did his rounds and conducted his practice. She stated that he worked long hours, made house calls and often would not return until very late

at night. During the time when he was not at the Harlem Valley State Hospital, he saw private patients (332-338). She recalled that when on military duty at various places, he did come home weekends (337-338).

Defendant testified that he practiced psychiatry and general medicine. He insisted that he had performed the services which he claimed (357-367).

Dr. Feldman indicated that services could include some research, but insisted that he performed services as noted in the claim forms (462).

Over objection, the government was permitted to examine defendant on his income tax returns (447-50).

The evidence of the defense presented a contradiction of that of the Government. The government in most instances could not contradict Dr. Feldman except generally by witnesses who stated that they were not treated on all the occasions mentioned, but couldn't remember which dates.

THE ISSUES PRESENTED.

1- Whether Dr. Feldman was denied affective assistance of counsel when the court ruled that an essential witness, Betty Santangelo, could not testify because it would constitute a conflict of interest on the part of trial counsel?

2- Whether trial counsel's report to the Court that defendant did not wish to accept a proffered "mistrial" to secure other counsel represented proper aid of counsel since no in-depth allocution was made by the court of Dr. Feldman?

3- Whether there was sufficient evidence as a matter of law to have submitted the case to the jury without specificity as to on what dates claims for services were in fact not performed?

4- Whether appellant was denied a speedy trial in view of the fact that the government had a complete case and had even interrogated Feldman in July 1973, but didn't indict until 1976?

5- Whether certain rulings by the court allowing a statement of Dr. Feldman taken in the absence of counsel to be admitted was error, especially since it included negative facts of refusing to sign a paper and being unable to answer a certain question?

6- Whether the 10 mail fraud counts should have been submitted to the jury in view of the duplicative nature of the indictment which also charged similarly in the false claims, and because public policy does not support mail fraud against the government, but only the public?

7- Whether the charge of the Court on unanimity and in other regards was proper?

POINT I.

THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AND OF AN OPPORTUNITY TO MAKE A PROPER DEFENSE BY THE FAILURE OF HIS TRIAL COUNSEL TO ADVISE FELDMAN TO ACCEPT A PROFFERED MISTRIAL WHEN IT BECAME OBVIOUS THAT A CONFLICT OF INTEREST EXITED BECAUSE OF THE FACT THAT AN ESSENTIAL WITNESS, BETTY SANTANGELO, ESQ., WAS ASSOCIATED WITH THE DEFENSE ATTORNEY.

A. *No meaninful allocution was conducted by the Trial Court to determine if Feldman was acting in his best interests; whether an impartial lawyer should have been brought in to advise him in these circumstances; or whether appellant was concerned over the costs involved in bringing in a new lawyer.*

Early in the trial it developed that an associate in defense counsel's firm, Betty Santangelo, had done a good deal of investigation in preparation for trial and had interviewed many witnesses. It bacame clear that she would be a most important witness, especially from the cross examination of Ms. Adams, *supra*. The government objected to any effort to use Miss Santangelo, directly or indirectly since it was obvious that she was a member of the defense counsel's team.

At page 94 of the record (17a) the following colloquy crystallizes the conflict and dilemma to Feldman:

> "THE COURT: * * * Mr. Martin, do you intend to call Miss Santangelo as a witness?
>
> "MR. MARTIN: I cannot tell you at this time. This is something that would have to abide the government's proof.

"THE COURT: Under the canons of ethics I don't think you can call her as a witness. If he *(sic)* is going to be a witness on an important matter in the case, *you are going to have to withdraw*; you *should have withdrawn in advance*. The canons of ethics are very specific about that. This is to *contradict* the *government's key witnesses* on *matters* that are *central* to their testimony."

The trial could proceed, the Court indicated, but without the aid of the crucial testimony of Santangelo. The Court then offered a most reasonable and fair solution by offering to grant a motion for a mistrial (94, 95; 17a, 18a):

"THE COURT: I am not going to permit you to call her * * *

"I am not going to permit you to call her to contradict the central part of the testimony of these key government witnesses. I think that is directly *contrary* to the *canons of ethics*. If you feel that it is necessary to call her, *you can move for a mistrial* and *we will start all over again with a new defense attorney*."

At 105 (28a) of the record, the Government indicated that a mistrial should be granted at that time, since only a small amount of testimony had been presented.

The Court declared that it would grant the mistrial at that time, but that the probability would drop very sharply as the case proceeded.

The Court obviously recognized that the defendant was represented by an attorney who had a conflict and thus might consciously or subconsciously be inclined to advise his client in such a way as to minimize the impact thereof, both from the standpoint of the conflict and from the aspect of having to return part of a fee.

Under these unusual circumstances, the Court should have conducted a thorough allocution of Dr. Feldman to ascertain if he was acting freely and without any undue suggestion or out of concern for losing the money he had already invested. The Court did virtually nothing.

> "MR. MARTIN: Your Honor, I have spent the last five or ten minutes discussing this issue with Dr. Feldman * * * I told him that [you] would give him a right if he wanted to at this moment to move for a mistrial, to obtain other counsel. I told him if this were to occur, we would, of course, refund to him any part of

> our fee that did not represent work that would [be] of use to new counsel" (107; 20a).

All the Court did was to ask the defendant, "Do you affirm that, Dr. Feldman?," to which appellant responded, "Yes, I do, Your Honor" (108; 31a).

Mr. Martin is regarded as a competent lawyer, but in this aspect of the case, he was held to be in a conflict of interest situation by the trial Judge. How, under these circumstances could the defendant get proper advice from the very lawyer whose fee might have to be returned in whole or part and who undoubtedly might be concerned about a proceeding before the ethics or grievance committees of the bar?

What kind of advice did Dr. Feldman get to convince him to forego the testimony of Miss Santangelo which the government and the Court had already determined would be of importance to the *central issues* in the case at bar?

It is obvious that in this aspect of the case, the appellant was without effective counsel. It was like having the advice of an adversary. The trial court clearly erred in not protecting the rights of Feldman.

In *Brubaker v. Dickson*, 310 F. 2d 30, 37, the Court aptly noted:

> "Due process does not require 'errorless counsel * * * but counsel reasonably likely to render *and rendering* reasonably effective assistance.'" (Emphasis ours.)
> *Cf. United States v. Handy*, 203 F. 2d 407; 23 C. J. S. Criminal Law § 982(8).

It is the duty of the trial Judge to protect this basic right (*Glasser v. United States*, 315 U. S. 60). The right to counsel for one charged with a serious crime means something more than mere companionship during trial and certainly does not contemplate representation by an attorney who has become involved in a conflict of interest to the best interests of his client, so that a crucial witness is eliminated (see, *Gideon v. Wainwright*, 327 U. S. 335).

The highest Court of New York proclaimed in *People v. Byrne*, 17 N. Y. 2d 209, 270 N. Y. S. 2d 193:

> "The right to have the assistance of counsel was held to be too fundamental to made to depend upon nice calculations by courts of the degree of prejudice arising from the denial."

In *People v. Tomaselli*, 7 N. Y. 2d 350, 353, the Court held that counsel must be functioning adequately to protect and assist the accused, otherwise he has no counsel at all.

The Sixth Amendment requires that the right to effective counsel be protected and preserved. Nothing in *Faretta v. California*, 422 U. S. 806, is to the contrary.

To the extent that a judgment had to be made wither to continue the case with Mr. Martin, or to request a mistrial, Dr. Feldman was his own lawyer and had no assistance of effective counsel (cf: Rule 44 Fed. R. Crim. Proc.).

The Court allowed a "hybrid" type of representation which is not sanctioned by 28 U. S. C. 1654 "* * * parties may * * * conduct their own cases personally or by counsel * * *" (*United States v. Swinton*, 400 F. Supp. 805 [S.D.N.Y.]).

Nowhere is there any waiver by appellant of his desire to or right of effective assistance of counsel.

The failure to impeach credibility could be decisive in a case such as this and certainly warrants reversal because of the inability to be able to call Miss Santangelo (see *Commonwealth v. Hillman*, 351 A. 2d 227 [Pa. 1976]).

That there was a conflict of interest is patent.

See, Disciplinary Rules, DR 5-102 and DR 5-101 B-1 through 4; ABA Standard Relating to "The Prosecution Function and the Defense Function," Section Part IV 4.3 (d).

This Court similarly condemned such conflicts of interest in *United States v. Alu*, 346 F. 2d 29, 33-34 (2d Cir. 1957).

Accord, *United States v. Wilson Torres*, 503 F. 2d 1120, 1126 (2d Cir. 1974). See, *United States v. Puco*, 436 F. 2d 761, 762 (2d Cir. 1971), and *Jackson v. United States*, 297 F. 2d 195, 198 (D. C. Cir. 1961, Berger, J.).

We submit that Mr. Martin should have immediately disqualified himself after the Court's ruling on conflict, and the trial court should not have permitted the continuation of the trial without a thorough allocution of Dr. Feldman who in this respect was representing himself.

The Disciplinary Rule specifically governing the situation at hand is DR 5-102 which provides as follows:

> Withdrawal as Counsel When the Lawyer Becomes a Witness.
>
> A. If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that *he or a lawyer in his firm* ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial,

except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 B-1 through 4. (Emphasis supplied.)

This Disciplinary Rule is not a broad ethical canon but a specific stricture aimed at preventing the type of conduct engaged in here. Proper practice as to the interviewing of, and relations with, prospective witnesses is covered in the ABA "Standards Relating To The Prosecution Function and the Defense Function," Section Part IV, "Investigation and Preparation."

Section 4.3(d) which provides as follows:

"4.3 Relations with prospective witnesses.

* * *

"(d) Unless the lawyer for the accused is prepared to forego impeachment of a witness by the lawyer's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present his impeaching testimony, the lawyer should avoid interviewing a prospective witness except in the presence of a third person.

"We believe that this prohibition is applicable to the United States Government and its attorneys as well as to private litigants

> and their attorneys. It is obvious that the opportunity for tailoring a witness's testimony to the needs of the Government's case is maximized if recourse is permitted to the testimony of an experienced trial attorney who is interested in the successful presentation of that case. Especially in criminal litigation, where so much is at stake for the defendant, must the Bench and Bar demand adherence to a principle that is designed to ensure objectivity in the presentation of evidence." *United States v. Alu*, 246 F. 2d 29, 33-34 (2d Cir. 1957).

Accord *United States v. Wilson Torres*, 503 F. 2d 1120, 1126 (2d Cir. 1974).

The type of questioning engaged in here was specifically condemned in *United States v. Puco*, 436 F. 2d 761, 762 (2d Cir. 1971). As the then circuit Judge Berger indicated, there should be no ethical double standard of conduct for the defense or the prosecution. *Jackson v. United States*, 297 F. 2d 195, 198 (D. C. Cir. 1961). Ms. Santangelo's testimony would be a flat violation of Disciplinary Rule 5-102.

POINT II.

THE CASE WAS FATALLY DEFECTIVE SINCE THE GOVERNMENT COULD NOT AND DID NOT ESTABLISH ON WHAT DATES, IF AT ALL, THE CLAIMS FOR SERVICE WERE UNTRUE. THE CHARTS USED FOR ILLUSTRATIVE PURPOSES WERE NOT COORDINATED WITH THE INDICTMENT AND COULD ONLY CONFUSE THE JURY.

A. *The jurors may well have been less than unanimous as to the dates allegedly involved when no services were rendered as claimed. The verdict was therefore defective. There was simply insufficient evidence to go to the jury.*

At 327 of the record the trial Judge admitted:

> "I think you have quite a persuasive argument that *the government has not sustained its burden beyond a reasonable doubt.*"

The Court said that if it was wrong, it was willing to be educated by its betters (324). Here the Court was referring to the fact that the Government could not possibly prove its allegations.

> "THE COURT: I think it suffices for the government to charge that an invoice contains a material false statement. Because of the peculiar circumstances of this situation, we have elderly patients who cannot remember four years later the specific dates on which they were visited by the doctor" (323).

The government introduced merely an inference that the claims were false without adducing proof in which regard they were false.

Perhaps the court below was confused on burden of proof. Oddly the Judge said (326):

> "THE COURT" Well, even without taking the stand himself, I am sure he can adduce evidence that he had gone home on those weekends from someone else.
>
> "MR. MARTIN: He does not have that burden. The government has that burden beyond a reasonable doubt."

At 613, the Court referred to the function of the jury to keep in mind the presumption of innocence "until" (not if or unless) proven guilty.

The Court assumed the claims were untrue, but even the government had to remind the judge that some visits were made; that claims were not wholly untrue.

The Court declined to charge request #12 of the defendant which related to "unanimity as to false claims."

The defense cited *United States v. Natelli*, 327 F. 2d 311 (2d Cir. 1975), which we maintain is apposite. The Court herein failed to recognize that a claim of insufficiency of evidence was being advanced, not a choice of two alternatives.

It is obvious that defendant wanted a judgment of acquittal and was not merely asking that some viewpoint be withdrawn from the jury's consideration. Thus in *United States v. Natelli, supra*, 527 F. 2d at 329, 330, the court explained its decision to reverse as follows which is apt here, too:

> "What prompts our present consideration of Scansaroli's petition for rehearing is his argument that he did make it sufficiently clear to the trial judge that he wanted a judgment of acquittal or some equivalent on the "nine-months earnings statement" specification. On reconsideration, *we agree that the arguments of counsel for Scansaroli with respect to the sufficienty of the evidence*, his motion to strike the evidence relating to the Eastern commitment (an essential part of the "nine-months earnings statement" specification) and the *co-defendant's* specific motion to withdraw the specification on the nine-months earnings statement make this a close question.[5] Cf. *United States v. Lefkowitz*, 284 F. 2d 310, 313 n.1 (2 Cir. 1960). As the Supreme Court has recently intimated in *Anderson v. United States*, 417 U. S. 211, 223 n.12, 94 S. Ct.

2253, 2262, 41 L. Ed. 2d 20 (1974), we may, in our discretion, consider a "sufficiency-of-the-evidence claim" even though the question arose below "only with respect to the admissibility of [certain] testimony." While *Anderson* also involved the question of whether the particular indictment was *unconstitutionally* vague, and all the cases cited by Mr. Justice Marshall involved similar *constitutional* questions, *we have concluded that we have sufficient discretion to adopt the reasoning in Anderson on this appeal.*

Accordingly, we do not purport to lay down a firm rule to govern the precise action required below for appealability where a single count contains more than one specification. Indeed, we could hardly do so without the empaneling of an *en bane* court. We decide simply, on further consideration, that appellant in this case did enough below to satisfy the spirit of the *Mascuch-Goldstein* rule. We accordingly withdraw our opinion on the government's petition and reinstate our original opinion as to Scansaroli in all respects. Cf. *United States v. Love*, 472 F. 2d 490, 496 (5 Cir. 1973." (Emphasis ours.)

Thus we maintain that the defendant properly raised the issue of insufficiency of evidence and the Court should have given the charge and should have not permitted the verdict to stand.

In *Coopedge v. United States*, 369 U. S. 438, the Court aptly proclaimed and cautioned (*id.* at 449):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to the law as a whole can well be expected without need for prompt, *eminently fair* and sober criminal law procedures. The *methods we employ in the enforcement of our criminal law* have aptly been called the measures by which the *quality of our civilization may be judged.*" (Emphasis ours.)

POINT III.

THE COURT ERRED IN PERMITTING THE JULY 10, 1973 STATEMENT OF DR. FELDMAN, TAKEN IN THE ABSENCE OF COUNSEL TO BE ADMITTED INTO EVIDENCE, ESPECIALLY SINCE INCLUDED THEREIN WERE DECLARATIONS BY DEFENDANT THAT HE REFUSED TO SIGN A PAPER AND THAT HE COULD NOT ANSWER AN UNPROVED ALLEGATION AS TO FORGERY OF SIGNATURES.

A statement was taken from defendant in the absence of counsel in July of 1973 by a representative of the Bureau of Health Insurance. He was advised that he

could stop talking at any time and that he did not have to answer any questions to which he objected (Saverio DeRosa, 212-226; 35a-49a).

We leave it to the motions as to whether the statement should have been suppressed for failure to provide counsel.

We maintain, however, that the objections made at trial to eliciting the fact that Dr. Feldman, who was without counsel, refused to give handwriting exemplars was error. This was a negative fact, not an admission (218-220; 41a-43a).

DeRosa reported: "He (Dr. Feldman) could not explain why there was a question about signatures" (218; 41a).

We submit that under *Doyle v. Ohio*, 965 Ct. 2240, 426 U. S. 16, it was improper to have elicited these negative facts. They are not admissions, but rather a failure to answer or no answer (*United States v. Hale*, 422 U. S. 171; *United States v. Harp*, 513 F. 2d 786, 423 U. S. 919, 536 F. 2d 601).

The prejudice is obvious. This tactic was not only prejudicial but may have compelled defendant to take the stand.

POINT IV.

IN CONNECTION WITH POINT III, IT IS OBVIOUS THAT BY JULY 1973 THE GOVERNMENT HAD ENOUGH TO INDICT. YET THEY WAITED UNTIL 1976 TO DO SO, THUS DEPRIVING FELDMAN OF SPEEDY JUSTICE. THE COURT ITSELF COMMENTED THAT THE PATIENTS WERE ALL OLD AND COULD NOT BE EXPECTED TO RECALL EVENTS AS FAR BACK AS 1971 AND 1972 IN 1976. THUS THE DELAY WAS PREJUDICIAL.

Since representatives of the government interrogated Dr. Feldman in an accusatory manner in July of 1973, it is manifest that at this point they could have indicted. All but 15 counts antedated 1973.

In *United States v. Marion*, 404 U. S. 307, the Supreme Court held that pre-indictment delay could be sufficiently prejudicial to cause a dismissal of an indictment for lack of a speedy trial. The same was held more recently by our highest Court in *Dillingham v. United States*, 96 S. Ct 303 (1975) (see Sixth Amendment).

The purposeful delay of indictment is more prejudicial than an arrest or complaint, since with no knowledge that the indictment is to be brought, an innocent man has no reason to fix in his mind the happending as to the alleged crime. *Mann v. United States*, 304 F. 2d 394, 396-397 (D. C. Cir. 1962); *Godfrey v. United States*, 358 F. 2d 850, 852 (D. C. Cir. 1966); 5 Stan. L. Rev. 95, 104; 1952, "Justice Overdue--Speedy Trial for the Pre-Trial Defendant."

The court below noted that no one could expect these elderly people to remember events of 1971 and 1972 at a trial in 1976 (323).

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly (*Regina v. Robbins*, 1 Cox. C. C. 114):

> "I ought not to allow the case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? * * * [I]f the charge be not preferred for a year or more, how can he clear himself? *No man's life would be safe if such a prosecution were permitted.* It would be very unjust to put him on his trial." (Emphasis supplied.)

In *Mann v. United States*, 304 F. 2d 394, 396-397 (D. C. Cir. 1962), the Court similarly noted:

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. *With no knowledge that the criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime.*" (Emphasis supplied.)

Moreover, there is no way a suspect can compel or insist that the Government commence a prosecution; nor can a defendant determine when or if the Government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In *Pollard v. United States*, 352 U. S. 354, 361-362 (1957), the Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted *United States v. Provoo*, 350 U. S. 857 (1955), *affirming Petition of Provoo*, D. Md., 17 F. R. D. 183 (1955), as condemning delay "caused by the deliberate act of the Government."

It is apparent from *Marion, supra* and from *Pollard v. United States, supra*, 352 U. S. at 361, that the Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment (see *Mann v. United States, supra*, 304 F. 2d at 396-397, n. 4; *Taylor v. United States*, 238 F. 2d 259 [D. C. Cir. 1956]; *Nickens v. United States*, 323 F. 2d 807 [D. C. Cir. 1963]; *United States v. Provoo, supra*). See 18 U. S. C. §3282.

In *Provoo*, as in *Taylor*, delay before trial was one of the combination of factors, which, in sum, affected a denial of the right to a speedy trial. The importance of this factor to the decision in *Taylor* was emphasized

in *James v. United States*, 261 F. 2d 381 (D. C. Cir. 1958), *cert. denied*, 359 U. S. 930 (1959). The delay in the case at Bar occurred between the alleged commission of the offense and the finding of an indictment, rather than between complaint and indictment or indictment and trial (*cf.* Rule 48(b) F. R. Crim. P.). The delay which occurred herein, is just as prejudicial and serious as any other delay, and clearly should not be immunized from the mandates of the Fifth or Sixth Amendments.

See, *Ross v. United States*, 349 F. 2d 210 (D. C. Cir. 1965). In *Ross*, the Court of Appeals (249 F. 2d at 211), proclaimed:

> "* * * We think a record of this kind *more accurately may be deemed as presenting a question akin to a Fifth Amendment due process issue*, centering around Appellant's ability to defend himself."

In *Ross*, the Court observed that a delay between the commission of the offense and the prosecution of a protracted nature might well constitute a denial of due process of law. It should be noted that in *Ross v. United States, supra*, the Court was not merely articulating its supervisory power over district courts in Washington, D. C.

See also, *Barker v. Wingo*, 407 U. S. 514, 531, 533; *Dickey v. Florida*, 398 U. S. 30, 37-38; *Hodges v. United States*, 408 F. 2d 543, 551 (8 Cir. 1969).

Since *United States v. Marion*, 404 U. S. 307 (1971), *supra*, it has become obvious that an indictment may be dismissed notwithstanding the fact that the statute of limitations has not run on the crime.

In *United States v. Marion*, 404 U. S. 307 (1971), the Court said (p. 324):

> "* * * it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment."

The Court said that there can be circumstances in which, as a matter of Fifth Amendment due process, "actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution" (*id.* p. 324).

See, *Dillingham, supra.*

POINT V.

THE MAIL FRAUD COUNTS SHOULD HAVE BEEN DISMISSED BECAUSE MAIL FRAUD WAS NEVER INTENDED TO APPLY TO MAIL SENT TO THE GOVERNMENT, BUT RATHER THE GULLIBLE PUBLIC, AND MOREOVER, THE COUNTS WERE DUPLICATIVE OF CHARGES IN THE FALSE CLAIMS COUNTS.

We rely upon the incisive opinion in *United States v. Henderson*, 386 F. Supp. 1048, 1052, 53 (S.D.N.Y. 1974), wherein the court clearly explains that mail fraud was designed to protect the gullible public from confidence men and the like and it was never contemplated or intended to apply to the mailing of material to the United States Government.

We believe it is not necessary to reiterate the language of the opinion as it is clearly set forth and should warrant this court in once and for all settling this issue.

Moreover, the mail fraud counts are duplicative of the false claims sections of the true bill.

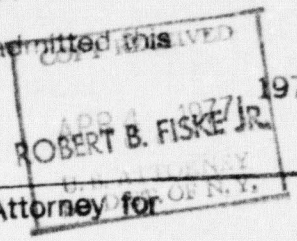
CONCLUSION.

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Defendant-
Appellant.

Service of ~~three (3)~~ two copies of the within is hereby admitted this day of 197



Attorney for